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IN THE

Supreme Court of the United States

OCTOBER TERM, 1972

No. 72-910

THE STATE OF MONTANA, EX. REL. STANLEY C. BURRER,
Petitioner,

v.

FORREST H. ANDERSON, as Governor of the State of Montana, et al.,
Respondents.

On Petition for Writ of Certiorari to the Supreme Court of the State of Montana

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PETITIONER'S REPLY MEMORANDUM

JAMES H. MORROW, JR. and
EDMUND P. SHEEHY, JR.
P. O. Box # 1168
208 East Main Street
Bozeman, Montana 59715
Attorneys for Petitioner

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INTRODUCTION

The objecting Respondents, in their Brief, do not really deny that the Governor of Montana and the majority members of the Montana Supreme Court violated the due process clause of the Fourteenth Amendment to the United States Constitution by holding the proposed new Constitution for the State of Montana was validly adopted under Article XIX, Section 8 of the Montana Constitution.

The Respondents merely seek to discourage this Court from reviewing the merits of these clear viola-

tions of the Fourteenth Amendment upon narrow procedural grounds. The Petitioner would reply as follows:

1. RAISING FEDERAL QUESTIONS

(a) First Issue

Respondents cite no decision of this Court, or any other court, that when the majority of the Montana Supreme Court is arbitrary and capricious in its decision this must be directly put to that Court for their review before this issue can be raised in this Court. This issue concerning a State Supreme Court's violation of the Fourteenth Amendment of the United States Constitution arises by that Court's arbitrariness and capriciousness in arriving at its conclusions. If a Court has chosen this course of procedure, the problem will not be solved by permitting that same Court to judge itself. The law does not require an idle act. It is sufficient to point out to that Court the errors in their conclusions on the facts and the law. This the Petitioner and others did in the exhaustive briefs and arguments prior to the decision, and later in briefs and Petition for Rehearing. Therefore, the First Issue raised by Petitioner is properly before this Court for review, and it is submitted that this issue is so unique and important to all concerned, that it is reason enough for this Court to grant a Writ of Certiorari.

(b) Second Issue

Respondents raise the issue of whether Petitioner has standing to raise the Federal issue of whether the majority decision of the Supreme Court of Montana and the Proclamation of the Governor of Montana directly conflicts with the due process and equal protection principles enunciated in the *Kohler* decision.

The Respondents do not deny that the factual issues were raised by several of the parties and amicus curiae. The Respondents admit that the issue of the Fourteenth Amendment and dilution of votes was squarely before the Court, because they acknowledge raising these issues themselves. Examples of specifically naming the Fourteenth Amendment and discussion of *Reynolds* v. *Sims* are to be found in the briefs of intervenors Robert L. Kelleher and Leo Graybill, Jr., et al. (Document 34, Pages 2 and 3, and Document 49, Page 30 et seq. respectively, of Montana Supreme Court Records), and Brief of Amicus Curiae on behalf of Montana Citizens Committee on the State Legislature (Document 54 of the same record). Further, the Respondents admit that Petitioner's issues were, at least, raised indirectly. (Page 5 of Brief of Respondents in Opposition) Thus, the objectors really don't deny that the Federal issues were presented to the Montana Supreme Court by one or more of the various parties and amicus curiae, but merely hope to rely on a procedural claim that the Federal issues were not raised by Stanley C. Burger. (Page 5 of Brief of Respondents in Opposition).

First of all, these results were brought to the attention of the Montana Supreme Court by Petitioner in his Petition for Rehearing, and, further, the majority of the Court, in its own opinion, recognized that the issues were present and were being considered. (See Pages 32 through 34 of Majority Opinion, found in Exhibit A of Petition).

Secondly, however, the rule of standing to raise issues raised by third parties as stated in *Puget Sound Power etc. Co.* v. *King County, Wash.,* 264 U.S. 22, 25, 68 L.Ed. 541, 545, 44 S.Ct. 261, has been explained by this

Court in *Barrows* v. *Jackson*, 346 U.S. 249, 257, 97 L.Ed. 1586, 73 S.Ct. 1031, to be "only a rule of practice", and it will not be applied when "the reasons which underline our rule denying standing to raise another's rights . . . are outweighed by the need to protect the fundamental rights which would (otherwise) be denied." Here, the Montana Supreme Court, in its Order dated June 22, 1972, not only consolidated two companion actions filed by this Petitioner and William F. Cashmore, M.D., but also set forth provisions for other persons to seek leave to intervene and to appear amicus curiae "in view of the statewide interest in the question here presented. . ." (See Appendix C of Petition for Writ of Certiorari) Four separate groups of persons chose to intervene, and numerous others filed Briefs Amicus Curiae. The several briefs covered the question of the adoption of the proposed Constitution from many different arguments and positions on behalf of all the electors of Montana and it is obvious, from a review of these briefs, that the various parties tried not to repeat everything the other briefs had discussed and argued. At the time of oral argument, the Court further ordered that oral argument could be presented by the parties who had been allowed to intervene, and then only after application to the Montana Supreme Court. Therefore, at the time of oral argument, the Court allowed five attorneys to present argument for and five attorneys to present argument against the adoption of the Constitution (Document 36 of Record of Montana Supreme Court) and, thus, counsel presented arguments by the various parties and amicus curiae consistent with the position of their clients. So, too, Stanley C. Burger did present and adopt arguments presented in written briefs by such amicus curiae as Gerald J. Neely, Franklin Longan,

and A. W. Scribner, as well as David M. Manning, et al., and William F. Cashmore, M.D., Parties.

In numerous cases, this Court has allowed a party to challenge the decision of a lower Court on issues allegedly belonging also to some other party. See *N.A.A.C.P.* v. *Alabama,* 357 U.S. 449, 459, 2 L.Ed. 2d 1488, 78 S.Ct. 1168, *Bates* v. *Little Rock,* 361 U.S. 516, 523, 4 L.Ed. 2d 480, 80 S.Ct. 412, *Communist Party* v. *Subversive Activities Control Board,* 367, U.S. 1, 81, *Griswold* v. *Connecticut,* 381 U.S. 479, 481, 14 L.Ed. 2d 510, 85 S.Ct. 1678.

In summary, the Montana Supreme Court made it clear it would entertain the thoughts and opinions by as many persons as would care to present them in Court, on the issue of the new proposed Constitution, because of the admitted statewide interest concerning its adoption. Under these circumstances, any rule of restraint by this Court is outweighed by the obvious fact that the people of Montana and the rest of this country need the protection by this Court of their fundamental voting rights. The fact that the Federal issues may have been more specifically raised by one of the multitude of other parties or amicus curiae, rather than this Petitioner, should not prevent this Court from making a review of the merits of this case. This Petitioner, like all the other parties and amicus curiae, seeks only to determine and protect the voting rights of the electors of Montana. This Court has stated that the determination of who may invoke Federal Constitutional rights is one to be made ultimately by this Court (*United States* v. *Raines,* 362 U.S. 17, 23, 4 L.Ed. 2d 524, 80 S.Ct. 519) and the controlling question then becomes whether the party "has sustained or is immediately in danger as sustaining some direct injury as the

result of the enforcement . . . " *Massachusetts* v. *Mellon*, 262 U.S. 447, 488, 67 L.Ed. 1078. Standing has never been uniformly imposed as a firm constitutional restriction of Federal Court jurisdiction. See *Dombrowski* v. *Pfister*, 380 U.S. 479, 486, 14 L.Ed. 2d 22, 85 S.Ct. 1116, *Barrows* v. *Jackson*, 346 U.S. 249, 97 L.Ed. 1586, 73 S.Ct. 1031, *Flast* v. *Cohen*, 392 U.S. 83, 99. The only rule insisted upon by this Court is that the party seeking review of a state court decision "must show that enforcement of the challenged judgment would deprive it of some right arising under the Constitution or laws of the United States properly asserted below." *Liberty Warehouse Co.* v. *Burley Tobacco Growers' Co-op*, 276 U.S. 71, 88, 72 L.Ed. 473, 48 S.Ct. 291. There is no question that this Petitioner as an elector, taxpayer and resident of Montana and citizen of the United States, is one whose rights have been deprived and violated by the decision of the majority of the Montana Supreme Court. The rights in question are that the people of the state are now to be governed by a new Constitution, which was not lawfully adopted. He has standing to object.

In addition to the previous citations of where the Federal issues were raised, (See Page 10 of Petition for Writ of Certiorari), this Court's attention is directed to the Brief of Gerald J. Neely, as amicus curiae on his own behalf (Document Number 43 of the Record of the Montana Supreme Court), wherein on Pages 4 through 9, Mr. Neely fully discusses the issue he had raised under the topic of "The Recent Montana Constitutional Convention Either Knew That an Extraordinary Majority was Required, or The Voters Were Misled." It was Mr. Neely who first pointed out to the Montana Supreme Court that for the Respondent parties to now urge that the phrase "majority of

the electors voting at the election" should be construed as allowing for a simple plurality was "somewhat like changing the rules of the game after the game has been played." This, too, is what your current Petitioner urges is a violation of the Fourteenth Amendment to the United States Constitution.

In summary, considering the importance of the situation presented to this Court, of whether Montana is to be governed by a new Constitution that was never legally or properly adopted by a majority of the electors of Montana voting at the special election on June 6, 1972; and considering the fact that Issue Number 1 does not need to be raised by Petitioner in the Montana Supreme Court, in any different means than how it was raised; and considering that the other issues concerning the Fourteenth Amendment and dilution of votes by changing the rules of the game after the game was over were raised by numerous parties before the Montana Supreme Court; and considering the procedure used by the Montana Supreme Court in determining the ultimate issue in this case—whether the Constitution was adopted—this Petitioner does have standing to present these matters for review by this Court.

2. RETROACTIVE DILUTION OF VOTING RIGHTS

The Respondents now propose that, by virtue of the Montana Supreme Court's holding that a simple majority vote is a "natural right", the phrase "majority of the electors voting at the election" can be properly interpreted as meaning only a "majority of the electors voting on the issue", regardless of the fact that this interpretation changes the effect of the electors' voting decision after those decision have been made. (See Page 3, Respondents' Brief in Opposition)

Regardless of how the Montana Supreme Court arrived at its decision of interpreting the language differently from its clear, literal meaning, the due process and equal protection clauses of the Fourteenth Amendment of the United States Constitution still do not allow the State to change the effect of the electors' voting decision after the election has been held, by retroactively changing the meaning of the language controlling the adoption of the issues before the people. The Respondents now claim that this issue should not be considered because no evidence was presented that a particular elector in Montana voted in reliance upon these representations. The Respondents misunderstand the claim of Petitioner and fail to recognize the law as stated in *Kohler* v. *Tugwell,* 292 F.Supp. 978, *affirmed by this Court in* 89 S.Ct. 879, 393 U.S. 531, 21 L.Ed. 2d 755 cited to this Court on Page 16 of Petition for Writ of Certiorari. In the *Kohler* decision, the Court recognized that the Fourteenth Amendment of the United States Constitution simply doesn't allow the retroactive dilution of votes by state action such as by changing the rules of the game after the game was played. The amendment prohibitions are against certain actions by state officials and there need be no specific reliance by any particular individual, as in the situation of a claim of fraud.

As recognized by the majority opinion, as found at Page 44 of Petition, from just a cursory examination of the voting in eighteen counties, it was obvious that 290 more electors voted for ballot Issue Number 3, concerning gambling, than voted on ballot Issue Number 1, on the basic Constitution. There can be no question that at least these electors assumed that they did not have to vote on all issues, in order to affect their outcome, as specifically stated on the ballot. Therefore,

even if evidence was important to show a reliance upon the representation, there was ample evidence before the Court.

In the Petition for Writ of Certiorari, this Petitioner has set forth the numerous representations made prior to the election by the State Legislature, the newspaper supplements, the State Supreme Court and the Constitutional Convention, as to how the various issues would or would not be adopted by the electors at the election. The Constitutional Convention even went to the extent of specifically setting this forth on the ballot, when they inserted the box explanation that:

> "The proposed Constitution will include a bicameral (2 houses) legislature unless a majority of those voting in this election vote for a unicameral (1 house) legislature in Issue 2."

(a) Transcript of Proceedings of Montana Constitutional Convention

A startlingly new fact has just been discovered. Neither at the time of the hearing before the Montana Supreme Court nor at the time of the Petition for Writ of Certiorari had there been published the Official Transcript of the Proceedings of the Montana Constitutional Convention. Within this past month, however, such Transcript has been completed, and a copy is now on file with the Library of Congress, in Washington, D. C., as well as with the library of the Montana Supreme Court. In this Transcript, it is revealed, in the clearest of detail, that the members of the Constitutional Convention believed that the Constitutional requirement of "a majority of the electors voting at the election" meant just what it says, and that they placed

the explanation in the box on the ballot so that the electors of Montana would know that even though each of the four issues might receive a simple plurality, that such issue would be approved only if it received a majority of the electors voting at the election. The discussion of preparing the ballot and the adoption schedule so as to not mislead the voters is contained in over 400 pages of the Transcript as the delegate lawyers, including Chairman Graybill, one of the Respondents herein, took turns explaining the language of Section 8 of Article XIX of the Montana Constitution and how it regards "a majority of the electors voting at the election" as necessary to obtain approval of any of the issues to be presented, and why a single plurality was not sufficient. For example, as written at Page 8818, Lines 14 to 25, of Volume XII of the Official Transcript, Mr. Graybill stated:

> "... the problem started in 1889 when the amendatory process, which included a provision for a constitutional convention, which we are using today, said—and unless submitted and so approved by a majority of electors voting at the election, no such revision, alteration or amendment shall take effect. That's why the Enabling Act says you've got to have a majority on every proposition, because the founding fathers said that. And they said that because they felt very strongly that a majority should support anything we do. It's not a mistake. It's just what they said."

Mr. Schiltz, the Chairman of the Style and Drafting Committee, using a blackboard, explained the mathematical requirements of a majority voting at the election. He used the figure of 200,000 electors voting and related that if only 96,000 voted for choice number I and 94,000 for choice number II, that neither would

carry. (Pages 8694 of Volume XII of Transcript of Proceedings of Montana Constitutional Convention) As another example, Delegate Brown, one of the objecting Respondents herein, proposed the placing of the explanation on the ballot, which proposal was approved by a vote of 73 Aye and 13 Nay, and in explaining the purpose of his proposal, as to why it was necessary that the explanation be put in the box on the ballot:

> "DELEGATE BROWN: . . . It seems to be the sense of the people here that if you had fifty percent plus one vote for the Constitution, but below there you had forty-eight percent for unicameral and thirty-two percent for bicameral, then the unicameral would not carry, but the people of Montana would be thoroughly confused and say, we voted for a unicameral, why didn't we get it? So, we want to put right on the ballot—we can show them the ballot and say, here, it says a majority of those voting, so the people won't misunderstand. In other words, I'm afraid that if you just say a majority votes for unicameral, they will think they have carried unicameral when in fact they haven't." (Page 9004 of Volume XII of the Official Transcript of the Proceedings of the Montana Constitutional Convention)

As this Court should note, five (5) of the delegates to the Constitutional Convention, including the Chairman Leo Graybill, Jr., and delegates John Toole, Dorothy Eck, Jean Bowman and Bruce Brown, the author of the above referred to proposal, all being convention officers, and all appearing in the Supreme Court proceedings, have maintained in their pleadings and briefs that the proposed Constitution should be adopted, because the language "majority of the electors voting at the election" does not mean what it says, but should

be construed to mean that a simple plurality is all that is necessary for an issue to be approved. (See Documents Numbered 49 and 53 of the Record of the Montana Supreme Court) At no time did any of these delegates inform the Montana Supreme Court that they had debated this very issue for two days of the convention during March 21 and 22, 1972, and that they had concluded that they would represent to the electors that more than a simple plurality would be necessary for any of the issues to be adopted on the ballot. All but Delegate Eck voted "Aye" on Mr. Brown's above proposal. (See Pages 8692 through 9094 of the Proceedings of the Montana Constitutional Convention Volume XII)

These delegates had been invited by the Montana Supreme Court to appear before the Court to assist the Court in declaring whether the proposed new Constitution was adopted or not. (See Order of Montana Supreme Court, dated June 22, 1972, Appendix C of Petition for Writ of Certiorari) Yet, these very delegates, rather than advising the Court as to the debates and decisions by the Constitutional Convention, perpetrated a hoax upon the Montana Supreme Court by remaining silent as to what had taken place, and, in fact, urged the Court to make a declaration completely opposite from what they and the rest of the Constitutional Convention had intended to represent to the electors who were going to the polls to vote on the issues presented at the election. This Petitioner urges this Court to take judicial notice of the Official Transcript of the Proceedings of Montana Constitutional Convention and accept this Petition for Writ of Certiorari and decide the merits of the issues presented here, or at least order that this matter be remanded to the Montana Supreme Court for further consideration, in view of

the evidence in the Official Transcript of the Proceedings of the Constitutional Convention which has just recently been published, and which was not available to the Montana Supreme Court at the time of its deliberations.

3. VOTING RIGHTS

It is submitted that the language of Section 8 of Article XIX of the Montana Constitution "and unless so submitted and approved by a majority of the electors voting at the election, no such revision, alteration or amendment shall take effect" creates a valid voting right of all electors. This right is that an elector is entitled to have his vote affect the outcome of the issues of election, when he votes on one or more of the issues submitted at the election, but elects not to vote on the issue in question, which, in this case, was Issue Number 1, being the proposed Constitution.

In the case of *Stoliker* v. *White,* 359 Mich. 65, 101 N.W. 2d 299, 300, cited by the minority opinion of the Montana Supreme Court at Pages 59 and 60 of Appendix A to Petition for Writ of Certiorari, the Michigan Supreme Court recognized this voting right and stated:

> "When the people went to the polls in 1958 to vote upon the question of a constitutional convention, they went with a contemporaneous understanding that a failure to vote upon the constitutional question would have the practical effect of a vote in the negative thereof."

The Michigan Court went on to hold the language "majority of such electors voting at such election" required more than a simple majority vote to call a constitutional question.

The Arizona Supreme Court recognized this voting right in the case of *Adams* v. *Bolin,* 247 P. 2d 617, 74 Ariz. 269, 33 ALR 2d 1102, wherein the Court cited with approval the Wyoming Supreme Court decision of *State ex. rel. Blair* v. *Brooks,* 17 Wyo. 344, 99 P. 874, which was concerned with the requirement of a "majority of the electors" in the Wyoming Constitution, and which Court characterized those who voted on certain issues but not on the constitutional issue and held:

> "Any other construction would authorize the counting of all who did not vote on the question as in favor of the adoption, a construction which is not borne out by the language nor is it in harmony with the spirit of the constitution."

To the same effect is the old Nebraska case of *State* v. *Babcock,* 22 N.W. 372:

> "The language of Section of Article 15 is that 'if a majority of the electors voting at such election adopts such amendments, the same shall become a part of this constitution.' This would seem to require a majority of all votes cast at that election, otherwise the words 'voting at such election' would be entirely without meaning. But these words evidently were intended as a restriction upon the right to change the fundamental law, and not permit a minority of the people of the state to incorporate new provisions therein * * * In this case an amendment to the constitution will be adopted 'if a majority of the electors voting at such election adopt' the same. This requires affirmative action. A majority of all those voting at the election must vote in favor of the proposition in order to adopt the same. The convention that framed the constitution doubtless presumed that if an amendment was necessary and really desired by the people, a majority would favor its adoption."

All of these Courts recognized that the particular language used in their Constitutions did create a voting right in the electors to have their vote have the effect as set forth in the various Constitutions, even though the Constitutional provisions might require something more than a simple majority or plurality before adoption of the issue in question.

The majority opinion of the Montana Supreme Court and its theory of "natural right" is in direct conflict with those decisions. The United States Supreme Court should also resolve this conflict.

CONCLUSION

It shocks the public conscience that officials of Montana would participate in improperly declaring the adoption of a new Constitution for the State of Montana, when such Constitution failed to be approved by a majority of the electors voting at the election. Perhaps the errors of the Montana Court can be explained in view of the newly discovered facts set forth in the transcript of the Proceedings of the Montana Constitutional Convention. There it is disclosed that the officers and members of the Montana Constitutional Convention understood the plain meaning of the phrase in Section 8 of Article XIX of the Montana Constitution, "majority of the electors voting at the election", and the stated, specific intent of the Convention was that the electors were to be specially advised of such result of their voting decision, i.e. that issues would pass only if they received approval by a majority of the electors voting at the election and would not pass if the issue received only a plurality of those voting on the issue. Yet, at the time of the hearing before the Montana Court, these officers and members of the Con-

stitutional Convention failed to disclose these facts to the Court, and urged that the document of their labor should be adopted even though it did not receive approval by a majority of the electors voting at the election. This was unconscionable and this Court must aid in the correction of such an injustice to the electors of Montana.

Further, however, the issues presented for review by the Petition for Writ of Certiorari concerning the dilution of the voting rights of electors by state officials retroactively changing the effect of an elector's voting decision, after the decision was made, in violation of the Fourteenth Amendment, has special importance not just to electors in Montana, but to electors in at least ten other states. The wording of the Montana Constitution respecting the vote necessary for amendment is not singular. Almost identical language is found in the Constitutions of Alabama, Alaska, Arkansas, Illinois, Minnesota and Oklahoma. Closely similar language is found in the Constitutions of Idaho, Mississippi, North Carolina and Wyoming.

Can the officials of these states, whether it be the executive, legislature, Courts, or Constitutional Conventions, represent to the electors on the ballot or otherwise, prior to the election, what affect a voting decision would have and then after the election, change by proclamation or decision, the effect of such decision? Hopefully, all electors are protected by the due process and equal protection laws of the United States Constitution from such action by state officials. This fundamental right can be firmly established and protected by this Court by its issuance of a Writ of Certiorari. Otherwise, inaction by this Court may suggest to state officials elsewhere that they may cause election

results to better suit their preferences, regardless of the prior representations to the electors and Constitutional guarantees.

This Court should grant this Writ of Certiorari and determine the issue of whether, under the facts, the proposed Constitution was properly adopted, or whether the whole election is invalid, and a new election should be held, or determine that these proceedings should be remanded to the Montana Supreme Court for further consideration.

Respectfully submitted,

JAMES H. MORROW, JR. and
EDMUND P. SEDIVY, JR.
P. O. Box # 1168
208 East Main Street
Bozeman, Montana 59715
Attorneys for Petitioner